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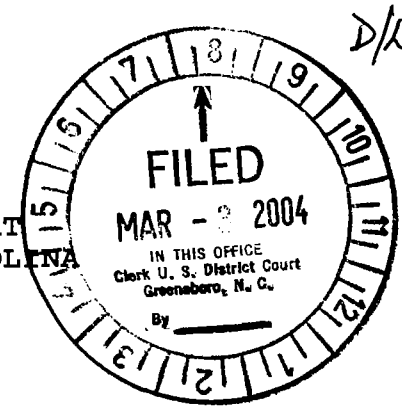

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

PATRICK MOLAMPHY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:02CV00720
	)	
TOWN OF SOUTHERN PINES, FRANK QUIS, Individually and as Mayor of the Town of Southern Pines, JOHN McINERNEY and MICHAEL HANEY, Individually and in their capacities as Town Council Members, KYLE SONNENBERG, Individually and as Town Manager and BART NUCKOLS, Individually and in his capacity as Planning Director for the Town of Southern Pines,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Eliason, Magistrate Judge

This case involves a challenge to a zoning action of the Town of Southern Pines (hereinafter "the Town"). It is before the Court on cross-motions for summary judgment and on a motion by plaintiff to amend his complaint. The material facts are undisputed for purposes of deciding the motions. In setting out the facts, the Court will note the few instances where disputes occur.

I. Facts

The Property

In early March of 2002, plaintiff, a developer and landowner, was a member of a limited liability corporation known as Pinehurst Hospitality Real Estate Holdings Limited Liability Company (hereinafter Pinehurst LLC). Pinehurst LLC owned a 2.81 acre

unimproved property (hereinafter the Property) located at the intersection of United States Highway 1 and Morganton Road. That intersection is in or near the defendant Town of Southern Pines and, in any event, is within the area that the Town can control through zoning ordinances. The property lies within the Town's "General Business Zoning District" and the "Morganton Road Highway Corridor and Urban Transition Highway Overlay Districts."

In early 2002, Pinehurst LLC was experiencing financial difficulties. This led plaintiff to negotiate with the other members of the LLC to purchase the entire property himself. Plaintiff intended to develop the property as a gas station/convenience store. The other members were amenable to this proposal and so, on March 1, 2002, plaintiff spoke with the North Carolina Department of Transportation (NCDOT) to make sure that a planned upgrade of the United States 1/Morganton Road interchange would not interfere with his plans to develop the Property. After being assured that it would not, plaintiff arranged to meet with defendant Bart Nuckols, who is the Town Planning Director for the Town of Southern Pines.

Meetings with Planning Staff

Plaintiff and another business associate met Nuckols first on March 5, 2002. Plaintiff requested this meeting because Southern Pines' Uniform Development Ordinance (UDO) Section 50 strongly encourages developers to consult with the Town's planning staff before submitting applications for permits. This is intended to minimize delay and confusion that might result from plans that do

not comply with the UDO. The first meeting between plaintiff and Nuckols involved general discussions of plaintiff's plans and the applicable regulations. At the end of the meeting, Nuckols suggested that plaintiff submit a concept plan for review.

Following the initial meeting, plaintiff engaged in several significant actions regarding his planned development of the Property. First, he arranged to buy the Property from Pinehurst LLC, with closing set in early May. Second, he hired a project engineer. Finally, he produced a one-page concept plan showing the location of his proposed store and presented that plan to Nuckols on March 29, 2002.

Nuckols reviewed plaintiff's concept plan and responded by letter on April 24, 2002. In this letter, he informed plaintiff that the concept plan did not comply with the UDO because the store's gasoline pumps were not screened from the public-right-way. Before sending the April 24th letter, Nuckols had attended a regularly scheduled work session of the Town Council of Southern Pines on April 22, 2002. At that meeting, he mentioned plaintiff's proposal and some members of the Council expressed concerns about the aesthetics of convenience stores in the Highway Corridor Overlay Districts (HCOD) which they felt were the "gateways" to Southern Pines. Accordingly, they directed Nuckols to draft an amendment to the UDO that would prohibit convenience stores in those Districts. Nuckols did so and included the proposed amendment in the agenda packets for the next scheduled meeting of

the Planning Board which was set for May 22, 2002. He did not mention this conversation in his April 24th letter to plaintiff.

In the meantime, plaintiff had received Nuckols' letter concerning the screening of the gas pumps and requested a further meeting with Nuckols. That meeting was held on May 2, 2002. At that meeting, the attendees discussed the screening issue, set backs, buffers, and other UDO issues about which there might be concern. No mention of the pending amendment was made. Plaintiff also states that he left the meeting with the understanding that Nuckols wanted a further set of fully engineered plans to be submitted. Therefore, plaintiff authorized such plans at a cost of "thousands" of dollars. He closed on the purchase of the Property on May 10, 2002.

On May 10 and May 13, 2002, a notice ran in The Pilot, a newspaper of general circulation in the Southern Pines area, announcing the upcoming Planning Board meeting and stating that the proposed amendment to the UDO would be on the agenda. At one point in his deposition, plaintiff states that he saw these notices because he was already looking for them. At other points in the record, he states that he first learned of the proposed amendment banning convenience stores in the HCOD by word of mouth on May 15, 2002. In any event, he did learn of the proposed amendment prior to the meeting on May 22, 2002. He then contacted Nuckols who plaintiff claims stated that he was "receiving guidance" about how

to handle plaintiff's proposal.[1] On May 17, 2002, plaintiff also met with defendant Frank Quis, the Mayor of Southern Pines. Quis allegedly told him that he and the Town Council were "not excited" about plaintiff's plans and that they intended to pass the proposed amendment.

On May 21 or 22, 2002, a representative of plaintiff submitted to the Planning Department six sets of plans showing his proposed store in more detail. While the plans may have been submitted to comply with Nuckols' request or/recommendation at the May 2nd meeting, they were also submitted for another reason. James Jackson II, plaintiff's representative related that he intended to submit the plans as part of an application for a building permit. While at the Planning Department, he received a checklist of items needed in order to complete the application process. Among these items were an approved water/sewer application, approval from the local fire department, a driveway permit from the NCDOT, an approved soil erosion plan, a PIN or LRK number, and a copy of a landscape contractor's license. Jackson took the list, applied for the water and sewer permit, gave a copy of the plans to the fire department, was unable to find the NCDOT office, and so went home for the day. He did not complete the application for the building permit and employees of the Town have testified that these items are required to apply for a building permit. Not only that, but the Town does not accept site plans as a part of an application for

[1]Nuckols denies ever having received any direction to stall, delay, or deny plaintiff's project.

a building permit unless all materials required for the permit are submitted at the same time.

Also on May 22, 2002, the Planning Board met to discuss the proposed amendment to the UDO. Plaintiff appeared with counsel at that meeting and they were able to present a "position paper" stating plaintiff's objections to the proposed amendment. The Planning Board recommended that the amendment not be adopted.

Town Council Meeting

Following the meeting of the Planning Board, the Town Council began preparations for a June 11th meeting. Accordingly, a notice concerning the meeting was sent to The Pilot to be published on Friday, May 24, 2002 and Monday, May 27, 2002. Unfortunately, these notices were actually published on May 27th and May 31st, which was in the same week. No further notice was given and the meeting was held as scheduled on June 11th. At that meeting, plaintiff once again appeared with counsel and spoke against the proposed UDO amendment. The Town Council rejected the Planning Board's recommendation and plaintiff's arguments and passed the amendment.

The passage of the UDO amendment did not end plaintiff's pursuit of his plans to build a store on the Property. Even following the June 11th passage of the UDO amendment, he and/or his representatives continued to attempt to gather the necessary items for completing a building application. Also, he pressed Nuckols to review the plans submitted on May 22nd. When Nuckols informed him orally of three problems with the plans, plaintiff insisted that

Nuckols write the problems down in a letter. Nuckols did so in a letter dated June 12, 2002.

Furthermore, on or about June 22, 2002, Jackson attempted to submit plans fixing two of the problems mentioned by Nuckols and labeling the proposed store a "grocery store," rather than a "convenience store." Plaintiff did this because the amendment prohibiting convenience stores in the Overlay Districts defined "convenience stores" as having less than 2000 square feet of floor space. Plaintiff's proposed store contained approximately 3600 square feet which, in his view, constitutes a grocery store rather than a convenience store. Grocery stores were a permitted use for the Property even following the amendment. According to Jackson, the Planning Department would not accept the new plans, telling him the project was "on hold." Jackson also completed a second water and sewer application on June 21, 2002. This document is marked as being "on hold" as of June 24, 2002. Despite the fact that his project was allegedly "on hold" with the Town of Southern Pines, plaintiff continued to have his engineers work on the project until August 9, 2002, shortly after which plaintiff decided to pursue this litigation.

Action by the NCDOT

While the parties were engaged in their ongoing battle over the UDO amendment and plaintiff's project, the NCDOT was busy formulating new plans of its own. Not long after plaintiff filed this case, he was informed by the NCDOT that it had changed its plans and intended to take a large portion of the Property in

conjunction with building the interchange/overpass along Morganton Road. The NCDOT also recommended that Southern Pines not approve plaintiff's project and informed the Town that the NCDOT would not approve driveway access, a prerequisite for a building permit. Finally, in March of 2003, the NCDOT announced to plaintiff that it intended to take all of the Property for its project, that it would be sending an appraiser to value the property, that it would then make him an offer, and that closing would proceed as soon as possible once plaintiff and the NCDOT had agreed on a price.

II. Plaintiff's Claims

This case was originally filed by plaintiff in the Superior Court of Moore County, before being removed to this Court by defendants. In his complaint, plaintiff raises five separate claims for relief under both federal and state law. His first claim arises under state law and alleges that Sections 321, 322, and 323 of the UDO establish certain procedures and notice requirements for amending the UDO and that defendants failed to follow them in several respects. His second state law claim is similar in nature, but relies on N.C. Gen. Stat. § 160A-364, rather than the UDO, to establish the notice requirements which the Town and its Council had to meet before passing the amendment to the UDO. For relief on his first two claims, plaintiff seeks a declaration that the UDO amendment passed on June 11, 2002 is null, void, and of no effect.

Plaintiff's third claim for relief alleges that defendants worked in concert between April 2002 and June 11, 2002 to prevent

plaintiff from obtaining site plan approval and a building permit to develop the Property as a convenience store. He claims that in doing so, defendants violated his right to due process as guaranteed under the United States and North Carolina Constitutions, and 42 U.S.C. § 1983. His fifth claim for relief is similar, except that it alleges that the individual defendants acted outside the scope of their authority as town officials in depriving him of his civil rights. Plaintiff then states that they should accordingly be held liable in their individual capacities for any damages to which he may be entitled. Plaintiff seeks damages and attorney's fees for the alleged deprivation of his rights.

Finally, plaintiff's fourth claim for relief asks for a declaratory judgment that, because of its size, plaintiff's proposed store does not constitute a banned "convenience store" even under the UDO as amended on June 11, 2002.

All parties have moved for summary judgment as to all of plaintiff's claims. Additionally, plaintiff seeks to amend his complaint to add an allegation to recover "special damages" and to allege that defendants have waived any claim of governmental immunity by the purchase of liability insurance.

III. Applicable Legal Standards

Summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled

to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the evidence in a light most favorable to the non-moving party. Pachaly v. City of Lynchburg, 897 F.2d 723, 725 (4th Cir. 1990). In order to oppose a properly supported motion for summary judgment, a party may not rest on conclusory statements. Rather, it must provide specific facts, particularly when that party has the burden of proof on an issue. Id. The mere fact that both parties request summary judgment does not necessarily mean that the material facts are undisputed. World-Wide Rights Ltd. Partnership v. Combe Inc., 955 F.2d 242, 244 (4th Cir. 1992). The Court scrutinizes the proffered proof, in the form of admissible evidence, to determine whether a party has met its burden of proof. Mitchell v. Data General Corp., 12 F.3d 1310, 1316 (4th Cir. 1993). A mere scintilla of evidence will not suffice. Rather, there must be enough evidence for a jury to render a verdict in favor of the party making a claim. Sibley v. Lutheran Hosp. of Maryland, Inc., 871 F.2d 479 (4th Cir. 1989).

When some of plaintiff's claims arise under state law, the Court must apply state law as it exists. Burris Chemical, Inc. v. USX Corp., 10 F.3d 243 (4th Cir. 1993). When it is unclear, the federal court must rule in such a manner as it appears the highest state court would rule if presented with the issue. If the state's highest court has not decided the particular issue, then the rulings of its lower courts may be considered as persuasive evidence of state law. But, these rulings are not binding on the federal court should it be convinced the highest court would rule

to the contrary. Sanderson v. Rice, 777 F.2d 902, 903 (4th Cir. 1985), cert. denied, 475 U.S. 1027, 106 S.Ct. 1226, 89 L.Ed.2d 336 (1986).

IV. Discussion

A. Issue of Mootness by the NCDOT's Taking of the Property

Defendants' first argument in favor of summary judgment is that the case is moot because of the NCDOT's plans to take plaintiff's entire property for its interchange project. Because this issue could potentially resolve all of plaintiff's claims, the Court will address it first.

As stated above, the NCDOT has informed plaintiff that it intends to take all of the Property. Although the parties have not given the Court any updates on the status of this taking, as of several months ago the NCDOT had proceeded so far as to tell plaintiff that it was sending an appraiser to the Property, that it would make an offer, and that it expected settlement and closing soon thereafter. Defendants argue that, under these circumstances, plaintiff obviously cannot build the convenience store as he planned. Moreover, they contend that all that remains is the valuation of plaintiff's property and that the outcome of this proceeding will have no effect on that value.

The Court must reject defendants' mootness arguments for two reasons. First and foremost, the taking of plaintiff's property by the NCDOT, while admittedly appearing imminent, has not actually occurred. Plans for road construction can and do change, as evidenced by the NCDOT's varying plans for the Property in this

case. Therefore, without a completed taking, the Court could not find that plaintiff's claims are moot, only that they might become moot at some point in the future.

Plaintiff also argues that this case is not moot, even if the NCDOT does take the property, because its outcome may affect the value that will be given the Property. Defendants respond that, because construction of the store had not begun at the time the NCDOT announced that it was taking the Property, the possible use of the site for a store may not be considered in valuing the property. Defendants' position does not appear to be an entirely correct statement of North Carolina law.

Under North Carolina law, the proper value to be given to land taken through condemnation proceedings is "'the highest and best use to which it would be put by owners possessed of prudence, wisdom, and adequate means.'" City of Wilson v. Hawley, 156 N.C. App. 609, 577 S.E.2d 161 (2003). Therefore, although a property owner's intended uses or plans are irrelevant to the value of the property, the future potential of the property can be considered. State v. Johnson, 282 N.C. 1, 14, 191 S.E.2d 641, 651 (1972). For instance, even though a tract of land may be presently used for farming, in valuing the land, a court can consider that the highest and best use of the land may be for a subdivision. Id. at 14-15, 191 S.E.2d at 651. If so, the value of the land would still be the value of a single tract of undeveloped land, but the potential use of the property would affect its value somewhat. In other words,

the plans of a property owner will not be considered, but potential uses, which can be objectively established, will be.

For this reason, it appears that, if the June 11th amendment prohibiting the building of a convenience store on the Property is invalidated, plaintiff will be able to argue to the NCDOT that the highest and best use of the Property was as a convenience store. For this reason, the case is not moot.

B. First and Second Claims - Inadequate Notice

Plaintiff's first two claims for relief arise under state law. Both allege that the June 11, 2002 amendment to the UDO is null and void because of improper procedure and notice that the Town Council used in attempting to amend the UDO. The first of these claims implicates the procedural and notice requirements of UDO Sections 321, 322 and 323, while the second looks to N.C. Gen. Stat. § 160A-364. In that regard, the requirements established by the statute are paramount to the UDO because ordinances are subject to "the limitations imposed by the enabling statute." Heaton v. City of Charlotte, 277 N.C. 506, 513, 178 S.E.2d 352, 356 (1971).

While the complaint raises additional matters involving the Planning Board hearing, plaintiff narrows his claims at summary judgment. He now alleges that the notices for the June 11th meeting did not sufficiently describe the character of the proposed amendment and were not published once a week for two consecutive weeks as required by both UDO Section 323(b) and N.C. Gen. Stat. §§ 160A-364. He further claims that the notices fail to state that the text of the amendment could be requested from the Town Clerk as

required by UDO Section 323(e). The Court will confine its inquiry to these matters.

The Uniform Development Ordinance Section 323(a) states that no amendment to the Town's zoning ordinances can be passed until a public hearing has been held on the amendment. Subsection (b) of that ordinance requires that the Town publish "a notice of the public hearing on any ordinance that amends the provisions of this chapter once a week for two successive weeks in a newspaper having general circulation in the area." Subsection (e) mandates, among other things, that any notice "[s]ummarize the nature and character of the proposed change" and "[s]tate that the full text of the amendment can be obtained from the town clerk."

North Carolina General Statute § 160A-364 requires that "notice of the public hearing shall be given once a week for two successive weeks in a newspaper having general circulation in the area," and "the city council shall hold a public hearing on it." Although not explicitly set out in the statute, an implicit requirement is that adequate notice requires a city to "apprise those whose rights may be affected of the nature and character of the action proposed." Sellers v. City of Asheville, 33 N.C. App. 544, 549, 236 S.E.2d 283, 286 (1977).

It is clear that the notice of the Town Council hearing was not published once a week for two successive weeks as required by UDO § 323(b) & (e) or N.C. Gen. Stat. § 160A-364. Furthermore, as will be seen, the summarization of the nature and the character of the proposed change was extraordinarily brief. No mention was made

that the full text of a written amendment (if there was one) was available from the Town Clerk.

Defendants appear to understand that the Town did not comply with the UDO or statutorily required publication time provisions. Their basic argument is that the notice and public hearings in this case satisfied the statute because the proposed action in this case was not substantially altered following a public hearing. They also appear to be relying on the Planning Board's notice and recommendation in order to satisfy the notice and hearing requirements with respect to the action taken by the Town Council. Finally, defendants argue that plaintiff cannot demonstrate any harm and, in any event, received actual notice of the hearing, attended it and presented his views, and, therefore, any technical deficiencies in notice should be ignored.

Both Section 160A-364 and the UDO require that the Town give adequate notice. In the instant case, the description of the proposed action is deficient. The extent of the notice given to the public was this two-line description:

> OA-08-02 Town of Southern Pines
> Request to amend Section 146, Use 2.111.

Section 146 of the UDO contains a Table of permissible uses set out in a grid consisting of four pages. There are twelve vertical columns delineating twelve zoning districts abbreviated RE, RR, RS, etc. The horizontal columns have use-categories such as "Residential," "Sale and Rental of Goods," "Manufacturing," etc. Number 2.111 denotes convenience stores, and the Table presented by

the parties shows that such use is or was permitted in two zoning districts. Thus, the notice "Section 146, Use 2.111" merely gives notice that the Council had a matter which might concern the zoning with respect to convenience stores. It did not specify what the consideration would be, what zoning districts would be involved, or what the proposed action would be.

As noted previously, the North Carolina courts have made it clear that the notices of zoning actions must be adequate. Id. In the instant case, the notice is not adequate under North Carolina law. In Board of Adjustment of Town of Swansboro v. Town of Swansboro, 108 N.C. App. 198, 423 S.E.2d 498 (1992), aff'd, 334 N.C. 421, 432 S.E.2d 310 (1993), the court sets out the standard, long established in North Carolina law, with respect to adequacy of the notice. There, the court points out:

> To be adequate, the notice required under Section 160A-364 "must fairly and sufficiently apprise those whose rights may be affected of the nature and character of the action proposed." Sellers v. City of Asheville, 33 N.C. App. 544, 549, 236 S.E.2d 283, 286 (1977). Not only must notice of a zoning ordinance or amendment "adequately inform as to what changes are proposed, [but] the actual change must conform substantially to the proposed changes in the notice. 8A Eugene McQuillan, The Law of Municipal Corporations § 25.249 (3d ed. 1986); accord Heaton v. City of Charlotte, 277 N.C. 506, 518, 178 S.E.2d 352, 359 (1971).

108 N.C. App. at 204, 423 S.E.2d at 501-502.

In that case, the town council wanted to make changes to the board of adjustment and effectively create a new board. An initial notice merely indicated the ordinance would reduce the term of appointments, and a second notice only advised the public that the

ordinance would abolish the board of adjustment. Neither notice referenced the fact that there would be a creation of a new board of adjustment. Consequently, the court held that these notices failed to sufficiently apprise those interested in the nature or character of the proposed action. (Eventually, a third notice was published which rectified the previous flaws and the court found that this re-enactment met the notice requirements of Section 160A-364.)

In the instant case, the public notice amounts to nothing less than cryptic shorthand that the meeting may take up the topic of zoning with respect to convenience stores. Neither the proposed action nor zoning districts affected[2] are identified. This is the antithesis of the purpose behind the concept of public notice which is to inform. For example, relying on Sellers, 33 N.C. App. 544, 236 S.E.2d 283, the South Carolina Court of Appeals held that notice which simply states that its purpose is to simplify and clarify the existing land use table and reduce the number of zoning districts does not provide adequate notice to support a change making gun ranges a conditional use requiring zoning board approval instead of a use of right. The court found the vague, general description of the proposed action to be "tantamount to no notice at all." Brown v. County of Charleston/Charleston City Council,

[2]The notice does indicate that maps delineating properties affected may be reviewed at the Planning Department. However, the parties have not addressed the issue of whether the failure of the notice to identify the properties affected could be rectified by reference to maps at the Town Hall. Nor has it been shown that the maps in this case were adequate for such a purpose.

303 S.C. 245, 248, 399 S.E.2d 784, 786 (1990). That is the quality of the notice in the instant case.

The importance of having adequate notice in the first instance is demonstrated by Heaton, 277 N.C. 506, 178 S.E.2d 352, one of the cases cited by defendants. There, an original notice fully described the substantial changes to the area in question and the type of changes to be made. Because the original notice fully described the proposed changes, the Court was able to determine that the minor changes made by the city council after the hearing did not alter the fundamental character of the proposal heard and discussed at the city council meeting. Contrast Sofran Corp. v. City of Greensboro, 327 N.C. 125, 393 S.E.2d 767 (1990) (reconsideration resulting in repeal is substantial change).

Requiring the notice to be descriptive and informative beyond some vague, cryptic notation serves two important public purposes. First, it alerts the public in general of, and those affected by, the proposal in order to encourage and permit public discussion concerning the possible ramifications of the proposal to alter or enact a zoning ordinance. Second, it enables a court to determine whether post-meeting changes substantially altered the original proposal. This does not mean that adequate notice requires description in the minutest detail of the change or forbids generic descriptions. Carter v. Stanly County, 125 N.C. App. 628, 482 S.E.2d 9 (1997)(ordinance to add use of government owned buildings, facilities or institutions not inadequate because State prison was not listed as one of the institutions). In the instant case, the

problem is not one of generic notice, but notice so cryptic and vague that it amounted to no notice at all.[3]

The Court further finds that the ordinance is invalid because the publication requirements of Section 160A-364 and the UDO were not met. The notice was not published for two successive weeks. Defendants attempt to circumvent this problem by piecing together an argument which somehow relies on the notice given with respect to the Planning Board as constituting adequate notice of the Town Council meeting. This argument is rejected out-of-hand because Section 160A-364 plainly states that it is the "City Council" which shall hold the public hearing and that it is notice of that public hearing which must be given. This language in no way permits defendants' argument that notice can somehow be given for a hearing before a body other than the Town Council in order to satisfy the statute. The North Carolina courts have been vigilant in enforcing the time requirements of Section 160A-364. Town of Swansboro v. Odum, 96 N.C. App. 115, 384 S.E.2d 302 (1989)(ordinance invalidated where notices were one year apart, last one was less than ten days before the meeting and a decision was not made until eight months after the meeting). Because the UDO may not be in derogation of

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[3]Plaintiff also points out that the notice did not state that the full text of the proposed amendment was available from the Town Clerk. This is not a requirement of Section 160A-364, but solely of Section 323(e) of the UDO. Defendants argue that this is not a requirement of the UDO because Section 323(f) states that while the Planning Board will make reasonable efforts to comply with the notice provisions, the Board's failure to do so will not render an amendment invalid unless it runs afoul of Section 323(b) which sets out the publication requirements. Because the notice is defective for other reasons, the Court declines to decide the matter.

the statute, the UDO must be interpreted likewise. Defendants' citation of Application of Raynor, 94 N.C. App. 91, 379 S.E.2d 880, rev. denied, 325 N.C. 707, 388 S.E.2d 448 (1989), is inapposite. The Court finds nothing in that case which permits notice given by a planning board to satisfy the notice requirements of Section 160A-364.[4]

Defendants' final argument is that even if the notices' publication dates and description were inadequate or defective, the ordinance is not invalid because plaintiff received actual notice of the hearing and was able to present his views. For this proposition, defendants cite W.C. Crais III., Annotation, Validity and Construction of Statutory Notice Requirements Prerequisite to Adoption or Amendment of Zoning Ordinances or Regulation, 96 A.L.R. 2d 449, § 11 (1964), and cases cited therein.

A review of the previously mentioned A.L.R. 2d section cited by defendants shows that some courts have held that technical defects in notice do not invalidate a zoning ordinance where a person contesting the ordinance had actual notice of a hearing or was present for it. See, e.g., Wilgus v. City of Murfreesboro, 532 S.W.2d 50 (Tenn. Ct. App. 1975); Clark v. Wolman, 243 Md. 597, 221 A.2d 687 (1966); Ridgewood Land Co. v. Simmons, 243 Miss. 236, 137

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[4]Ironically, the Court must point out that if defendants could rely on the Planning Board's recommendation as constituting adequate notice under Section 160A-364, that would not help their cause. In the instant case, the Planning Board recommended against adopting amendments to the ordinance. The Town Council then made a contrary decision which clearly would have to be considered a substantial change in the Planning Board's recommendation. This fact emphasizes why it is the notice of the hearing before the Town Council which is important and not notice and hearings before subsidiary boards.

So. 2d 532 (1962); Schlagheck v. Winterfield, 108 Ohio App. 299, 161 N.E.2d 498 (1958). However, the compendium also shows that other courts have held that actual notice will not save an ordinance passed without all statutory notice requirements having been followed. Hart v. Bayless Invest. & Trading Co., 86 Ariz. 379, 346 P.2d 1101 (1959); Tonroy v. City of Lubbock, 242 S.W.2d 816 (Tex. Civ. App. 1951). The question then is which category have North Carolina's courts chosen.

At the time of briefing, this question might have been an open one. However, the North Carolina Court of Appeals has now decided the issue in Sandy Mush Properties, Inc. v. Rutherford County, ___ N.C. App. ___, 586 S.E.2d 849 (2003). In that case, the defendants published only a single notice in a local newspaper announcing that a public hearing would be held on a proposed ordinance that would prohibit the plaintiff's plans for one of its properties. The plaintiff became aware of the hearing, sent a representative to the hearing, and had the representative speak in opposition to the ordinance. The ordinance eventually passed and the plaintiff sought to have the ordinance declared invalid because the notice of the hearing was published only once and not twice in consecutive weeks as required by N.C. Gen. Stat. § 153A-323.[5]

The North Carolina Court of Appeals held that "[f]ailure to adhere to the notice requirements of Section 153-323 will result in

[5]North Carolina General Statute § 153A-323 applies to counties, rather than cites or towns, but is materially identical to N.C. Gen. Stat. § 160A-364 as far as the amount and timing of the notice required for public hearings.

any subsequently enacted ordinance . . . being invalid . . . ." Sandy Mush at 851. No exceptions for substantial compliance or actual notice were mentioned and, more importantly, the fact that the plaintiff in Sandy Mush had actually appeared at the hearing and spoken against the proposed ordinance made no difference in the case.

The decision is persuasive and likely would be applied by the North Carolina Supreme Court. The fact that one affected owner appears at a meeting does not cure the defect with respect to others with similar interests. And to have another rule invites needless controversies and suspicions, and encourages sloppy practices, the avoidance of which is the rationale behind requiring adequate notice in the first instance. This is especially true with respect to the publication times, which are quite susceptible of precise compliance.

The effect of the holding in Sandy Mush on the present case is obvious. No meaningful distinction can be made between the defendants in Sandy Mush publishing only one notice and the defendants in the present case publishing two notices, but in the same week. And, although not necessary for the instant decision, Sandy Mush can be read to require compliance with the descriptive notice requirements of Section 160A-364 in spite of actual notice and the appearance of a property owner. For this reason, the Court finds that defendants failed to give notice as required by N.C. Gen. Stat. § 160A-364 and the UDO. This failure to give notice renders the amendment null and void. Plaintiff's motion for

summary judgment on his first and second claims for relief is granted.

C. Fourth Claim

Plaintiff's fourth claim seeks to have the Court rule on whether or not his proposed store is a "grocery store," not a "convenience store" under the amendment passed at the June 11th meeting. The issue is moot because the amendment is invalid. The Court will dismiss plaintiff's fourth claim accordingly.

D. Third and Fifth Claims[6]

In his third and fifth claims for relief, plaintiff alleges that defendants violated his due process rights as guaranteed by 42 U.S.C. § 1983, the United States Constitution, and the North Carolina Constitution.[7] Before addressing the merits of the claims, the Court will examine defendants' affirmative defenses, wherein they raise two types of immunity as a bar to some or all of plaintiff's claims, and seek to dismiss state law claims against individual defendants in their individual capacity.

1. Affirmative Defenses/Immunity

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[6]In their brief, defendants argues that plaintiff has failed to properly allege or prove a claim for civil conspiracy. However, the complaint does not clearly set out a civil conspiracy claim, and plaintiff does not appear to have intended to raise one. Plaintiff has not responded to defendants' argument and, thus, he has now abandoned any such claim. To the extent that it ever existed, plaintiff's state law claim for civil conspiracy is dismissed.

[7]Plaintiff's fifth claim for relief does not mention due process, but states that plaintiff was deprived of his "civil rights." However, he does not identify any violations, other than due process violations, in the briefing of the summary judgment motions. Therefore, any other violation he may have originally alleged has now been abandoned.

a. Governmental Immunity

Defendants first assert governmental or sovereign immunity created by state law. This doctrine only applies to the state law claims. It holds that a party cannot successfully sue the State or its agencies for acts undertaken in performance of their governmental duties unless the State waives governmental immunity. Corum v. The University of North Carolina Through Board of Governors, 330 N.C. 761, 772, 785, 413 S.E.2d 276, 283, 291, cert. denied, Durham v. Corum, 506 U.S. 985, 113 S.Ct. 493, 121 L.Ed.2d 431 (1992).[8] Further, suit against a State official in his or her official capacity amounts to a suit against the State. Harwood v. Johnson, 326 N.C. 231, 237, 388 S.E.2d 439, 443 (1990). This doctrine extends beyond State officials and also applies to local governments and officials and, therefore, to the individual defendants in this case. Beck v. City of Durham, 154 N.C. App. 221, 573 S.E.2d 183 (2002).

Governmental immunity is not absolute. North Carolina allows a governmental entity to waive its immunity through the purchase of liability insurance. Messick v. Catawba County, North Carolina, 110 N.C. App. 707, 714, 431 S.E.2d 489, 493-94, rev. denied, 334 N.C. 621, 435 S.E.2d 336 (1993); N.C. Gen. Stat. § 160A-485 (waiver

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[8]Given that governmental immunity applies only to state law claims, it appears that immunity would have little or no practical impact on the outcome of this case whether or not it is applied. This is because plaintiff's due process claims under federal law would remain and defendants contend that those claims are identical to his state law due process claims. Corum v. The University of North Carolina Through Board of Governors, 330 N.C. 761, 772, 785, 413 S.E.2d 276, 283, 291, cert. denied, Durham v. Corum, 506 U.S. 985, 113 S.Ct. 493, 121 L.Ed.2d 431 (1992) (governmental immunity does not apply to federal claims).

through insurance provision for local governments). A plaintiff must allege that this waiver has occurred in order to take advantage of the waiver and state a proper claim for relief. Whitaker v. Clark, 109 N.C. App. 379, 384, 427 S.E.2d 142, 145, rev. denied and cert. denied, 333 N.C. 795, 431 S.E.2d 31 (1993).

Plaintiff did not allege in the complaint that defendants had waived governmental immunity by purchasing insurance. However, he now moves to amend his complaint to add that allegation. Defendants oppose that amendment stating that it will prejudice them. However, their statement to that effect is wholly conclusory. The only new evidence that will be added is the fact of the liability insurance. This is akin to adding a new legal theory that has no affect on the discovery or trial, except for the fact of its application. Medigen of Kentucky, Inc. v. Public Service Com'n of West Virginia, 985 F.2d 164 (4th Cir. 1993); Frank M. McDermott, Ltd. v. Moretz, 898 F.2d 418 (4th Cir. 1990).[9] In these circumstances, delay alone does not require the Court to deny the motion to amend and no other factor has been called to the Court's attention. For this reason, the Court will grant plaintiff's motion to amend and deny defendant's request to dismiss any of plaintiff's claims due to his initial failure to allege waiver of governmental immunity.

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[9]Plaintiff also seeks to add claims for special damages of diminution of value of the Property and lost profits. This is more than the addition of a legal theory. It involves special evidence. Defendants could be prejudiced by allowing this part of the amendment because discovery has ended. Plaintiff did not reply to defendants' brief and show otherwise. Thus, the Court will not allow the claim of "special damages" as a part of the amended complaint.

b. Legislative Immunity

Defendants' next claim is that defendants Quis, Haney, and McInerney, as voting members of the Town Council, have legislative immunity for all of their official acts. "If legislators of any political subdivision of a state function in a legislative capacity, they are absolutely immune from being sued under the provisions of [42 U.S.C.] § 1983." Bruce v. Riddle, 631 F.2d 272, 279 (4th Cir. 1980). (Of course, the immunity does not encompass acts engendered by corruption. Scott v. Greenville County, 716 F.2d 1409, 1423 (4th Cir. 1983).) The courts of North Carolina also extend this type of immunity to claims brought under state law. See Stephenson v. Town of Garner, 136 N.C. App. 444, 450-451, 524 S.E.2d 608, 612-613, rev. denied, 352 N.C. 156, 544 S.E.2d 243 (2000). Consequently, defendants Quis, Haney, and McInerney are immune for actions taken in their legislative capacity, such as when they considered and voted for the June 11th amendment that barred convenience stores in the HCOD.

Plaintiff contends legislative immunity may not be applied when the zoning action only affects one property or a narrow class of properties. He further contends that Quis', Haney's, and McInerney's vote for the June 11th amendment was such an action. Plaintiff relies on Nasierowski Bros. Inv. Co. v. City of Sterling Heights, 949 F.2d 890 (6th Cir. 1991), to support his proposition.

That case is inapposite to the situation before this Court.[10] There, proper notice was given for a hearing on a master zoning plan. After the hearing, and at an executive session, a council member recommended re-zoning a narrow strip of 12-15 parcels, which included the plaintiff's, and selectively excluded two existing non-conforming uses. The recommendation was adopted. The court found the action taken after the meeting violated the plaintiff's right to due process notice because of the substantial change from the proposed ordinance. It enjoined enforcement of the ordinance. The issue of whether the individual defendants were entitled to immunity was not part of the decision. Id. at 898.

It is true that here, as in Nasierowski, it was a council member's opposition to plaintiff's development proposal which led to the ordinance revision. But that fact only means that due process notice requirements must be followed. Id. at 897. Even a specific zoning decision can constitute a legislative act. Jackson Court Condominiums, Inc. v. City of New Orleans, 665 F. Supp. 1235, 1244 (E.D. La. 1987), aff'd, 874 F.2d 1070 (5th Cir. 1989), citing, Shelton v. City of College Station, 780 F.2d 475, 480 (5th Cir. 1986). Plaintiff fails to show some type of corrupt activity or non-legislative motive operating here. Finally, the ordinance did not just affect plaintiff's parcel, but about a hundred other properties which lie in the HCOD including, apparently, owners of

[10]The same is true for plaintiff's citation of Harris v. County of Riverside, 904 F.2d 497 (9th Cir. 1990), and for much the same reasons.

existing stores. (Minutes of June 11th, 2002 Town Council meeting, Docket no. 15, at p. 100)

For the above reasons, the Court rejects plaintiff's opposition to defendants' legislative immunity contentions. Instead, it finds that the question of whether a governmental body's zoning decisions are legislative turns on whether the act establishes a new law or policy or simply interprets an existing law or policy as it relates to a particular property or properties. Scott, 716 F.2d at 1422-23; Fralin & Waldrin, Inc. v. Henrico County, Va., 474 F. Supp. 1315, 1320-21 (E.D. Va. 1979); Northfield Development Co., Inc. v. City of Burlington, 136 N.C. App. 272, 282, 523 S.E.2d 743, 750 (2000). For example, a new ordinance establishing zoning or changing existing zoning classifications is legislative, while a decision that a certain permit application should be rejected, because a current zoning law forbids the proposed use of the property, is not. The amendment in the present case was the first type of action, i.e., a legislative act. For this reason, plaintiff's claims against defendants Quis, Haney, and McInerney are barred by legislative immunity and will be dismissed. However, his claims against the Town and defendant Nuckols are not affected.[11]

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[11]Plaintiff's allegations against Nuckols consist of Nuckols allegedly stalling plaintiff's progress in filing an application for a building permit. This would not constitute legislative action because the permit process concerns the application of existing zoning rules. To the extent plaintiff contends one of the Council members was "directing" Nuckols and, therefore, liable in his individual capacity, plaintiff has asserted nothing more than conclusory allegations. Also, as will be seen later, the due process claim against Nuckols (continued...)

c. Individual Liability

Defendants next seek dismissal of plaintiff's claims against defendants in their individual capacity. Under North Carolina law, a plaintiff cannot prevail on a claim against an official in his individual capacity unless the official acted "separate and apart from official duties . . . ." Whitaker v. Clark, 109 N.C. App. at 383-84, 427 S.E.2d at 145. As with governmental immunity, this is a state law doctrine affecting only plaintiff's state law claims, not his claims brought under federal law. Andrews v. Crump, 144 N.C. App. 68, 76, 547 S.E.2d 117, 123, rev. denied, 354 N.C. 215, 553 S.E.2d 907 (2001).[12]

In claim five of his complaint, plaintiff does make the bare allegation that the individual defendants acted "outside the scope of their authority as elected and appointed Town officials." (Complaint, ¶ 75) However, the complaint does not set out any specific acts of the defendants which were outside the scope of their authority. More importantly, plaintiff has failed to support his bare allegation with any evidence that defendants acted outside their official authority. Whether or not that authority was properly used is a separate question which will be addressed later. However, plaintiff has not made any allegations or produced any evidence that defendants were not acting within their authority as

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[11](...continued)
fails on the merits.

[12]Defendants seem to have mistakenly raised the argument as to plaintiff's state and federal law claims. However, any confusion on their part may have been created by plaintiff lumping his state and federal law claims together in his complaint.

town officials to pass ordinances or review his submissions under procedures set up by the UDO. Therefore, plaintiff's individual capacity claims brought under state law against Nuckols will be dismissed, as well as any individual capacity state law claims against Quis, Haney, and McInerney, to the extent plaintiff arguably impliedly raised such (see n.11).

2. Due Process Claims

a. Procedural Due Process Under the United States Constitution

By virtue of the above rulings, the remaining claims only implicate defendants Nuckols and the Town. Plaintiff's complaint does not make clear whether his due process claims are based on procedural due process or substantive due process. However, he and the defendants have briefed his claims under both theories. For this reason, the Court will treat the complaint as raising both.

In order to establish a claim for procedural due process, plaintiff must show that (1) he has a protected property interest, (2) defendants deprived him of that interest, and (3) they did so without due process of law. Tri County Paving, Inc. v. Ashe County, 281 F.3d 430, 436 (4th Cir. 2002). Generally, the Court will look to see whether plaintiff was deprived of his property rights without proper notice and an adequate opportunity to be heard. Id. However, these requirements in zoning cases are not normally stringent. Id.

Here, defendants claim initially that plaintiff cannot demonstrate a vested property right so as to meet the first element of his claim. The Court agrees, as will be seen later when it

discusses plaintiff's substantive due process claim. But, plaintiff's procedural due process claim fails for an additional, more basic reason.

It is true, as discussed above, that defendants failed to give plaintiff notice sufficient to satisfy N.C. Gen. Stat. § 160A-364 and the UDO. Plaintiff seeks to use this holding to argue that such failure satisfies the second and third elements of his due process claim. The argument combines and confuses state and federal law. Harris v. Birmingham Bd. of Education, 817 F.2d 1525, 1527 (11th Cir. 1987). It is not the purpose of the United States Constitution to ensure strict compliance with state statutes independent from any property right. Nor does a violation of state law notice requirements automatically translate into a violation of due process. Id. In fact, procedural due process is satisfied in a zoning matter when a property owner affected by a proposed ordinance receives actual notice of the hearing and has a chance to speak at the hearing. Schafer v. City of New Orleans, 743 F.2d 1086, 1089 (5th Cir. 1984); City of Sault Ste. Marie, Mich. v. Andrus, 532 F. Supp. 157, 163 (D.D.C. 1980). That is what occurred here. Plaintiff had actual notice of the Town Council hearing and spoke against the proposed amendment. Under such circumstances, he cannot complain that his procedural due process rights were not fully satisfied. For this reason, his procedural due process claims based on the Fourteenth Amendment of the United States Constitution are dismissed.

b. Substantive Due Process Under the United States Constitution

Substantive due process claims are decided under different and higher standards than procedural due process claims and are actually more difficult to prove. In order to show that his substantive due process rights were violated, plaintiff must demonstrate that (1) he had a protected property interest, (2) defendants deprived him of that interest, and (3) defendants' actions were "so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency." Sylvia Development Corp. v. Calvert County, Md, 48 F.3d 810, 827 (4th Cir. 1995)(emphasis in original). "Substantive due process is a far narrower concept than procedural; it is an absolute check on certain governmental actions notwithstanding 'the fairness of the procedures used to implement them.'" Love v. Pepersack, 47 F.3d 120, 122 (4th Cir.), cert. denied, 516 U.S. 813 , 116 S.Ct. 64, 133 L.Ed.2d 27 (1995). Therefore, to show a substantive deprivation in the context of a zoning decision, plaintiff must show that defendant's decision "'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.' " Sylvia Development, 48 F.3d at 827 quoting, Nectow v. City of Cambridge, 277 U.S. 183, 187-88, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928).

Defendants contend that plaintiff cannot prove the first element of the substantive due process claim because he cannot show he had any property right to build his store. Whether a plaintiff

has a sufficient property right to assert a due process claim is a question answered by state property law. Gardner v. City of Baltimore Mayor and City Council, 969 F.2d 63, 68 (4th Cir. 1992). Moreover,"'[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" Id., quoting, Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Any discretion to deny a permit or approval of a plan defeats a claim of property interest. Id.

Defendants argue that there are only three ways for a person to establish a vested right to develop property in North Carolina. Two are statutory and one arises under the common law. The first involves obtaining a building permit prior to the passage of an ordinance. N.C. Gen. Stat. § 160A-385(b). The second requires obtaining approval for a "site-specific development plan" from a city after a proper public hearing. Id. and N.C. Gen. Stat. § 160A-385.1. Finally, there exists a common law right to develop property if (1) the property owner makes substantial expenditures on a property prior to the passage of an ordinance, (2) these expenditures were made in good faith, (3) the property owner acted with reasonable reliance on a valid governmental approval[13] for the

[13] Koontz actually uses the term "building permit" rather than "valid governmental approval." However, defendants appear to concede that other forms of approval may suffice.

project, and (4) complying with the new ordinance would harm the landowner. Koontz v. Davidson County Bd. of Adjustment, 130 N.C. App. 479, 481, 503 S.E.2d 108, 109, rev. denied, 349 N.C. 529, 526 S.E.2d 177 (1998).

Plaintiff does not contend that he can utilize any of these three vesting methods in order to develop the Property.[14] Nor could he given the evidence in the case. He never obtained a building permit, approval for a site specific development plan, or any other type of "valid approval." Instead, in his brief in support of his motion for summary judgment, plaintiff claims that his rights were violated because the defendants (1) failed to inform him of the planned UDO amendment and (2) failed to tell him what he needed to do to vest his right to develop the property. He also claims that Nuckols failed to promptly review and comment on the plans that he submitted in order to delay plaintiff until the amendment was passed. As an afterthought in a reply brief, he adds an argument that defendants are "estopped" from claiming that he did not have a vested property right. He contends defendants' actions in concealing the pending amendment from him and in delaying the

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[14]In his response to defendants' motion for summary judgment, plaintiff does seem to make an argument that he can establish a property right with something less than an issued building permit, at least if defendants delayed him from receiving that permit. In making the argument, he relies on the case of Scott v. Greenville County, S.C., 716 F.2d 1409 (4th Cir. 1983). However, this case does not aid his cause. The plaintiff in Scott actually submitted a proper and completed application for a building permit prior to a moratorium on such permits being passed. The Fourth Circuit found that, because the county had no discretion to deny the permit once a proper application was filed, the plaintiff in that case had a vested property right at the time of the filing. Here, plaintiff never submitted an application and so cannot claim a vested property right on that basis.

courtesy review process were the cause of his failure to vest his property rights by submitting a proper application for a building permit.

Plaintiff's attempts to blame defendants for his failure to vest his property right cannot succeed in light of the evidence in front of the Court. First, plaintiff's allegations are legally unsupported. Plaintiff has produced no authority showing that Nuckols or any other defendant had any duty or obligation to provide him with notice of the pending UDO amendment other than as required by due process, North Carolina statutes, and the UDO. Likewise, he has not produced any authority for the proposition that any of the defendants had a duty under state law to advise him of the steps he needed to take to vest his property rights.

Plaintiff's allegations are also factually unsupported. He has not produced any evidence beyond bare allegations that Nuckols engaged in any unusual delay during the review of plaintiff's plans prior to the passage of the UDO amendment on June 11th. When plaintiff first approached Nuckols in early March of 2002, no amendment was proposed and there would have been no reason for Nuckols to delay plaintiff. Plaintiff then submitted a concept plan to Nuckols on March 29, 2002. Once again, no amendment had been proposed at that time. In fact, the amendment was not proposed until April 22, 2002. A mere two days later, Nuckols informed plaintiff by letter that his concept plan needed changes regarding the screening of the gas pumps. Had Nuckols sought to delay plaintiff, he could have waited a much longer time to write

the letter. Furthermore, when plaintiff then requested a meeting with Nuckols, Nuckols promptly met with him on May 2, 2002. This certainly does not show delay on Nuckols' part, but rather, expedition. The critical fact is that nothing Nuckols did suggests that he took inappropriate steps to hide the amendment from plaintiff or that he treated plaintiff any differently than anyone else asking for a courtesy review.

Finally, at the May 2nd, 2002 meeting, plaintiff and Nuckols were apparently able to reach an agreement on the gas pump issue. It is true that Nuckols did not tell plaintiff of the proposed amendment on that date, and instead, asked plaintiff to submit more detailed plans. To obtain common law vesting, plaintiff would have to show that he made substantial, good faith expenditures on the property prior to the passage of the ordinance in reasonable reliance on prior governmental approval. Koontz, 130 N.C. App. 479, 503 S.E.2d 108. Plaintiff fails to show that Nuckols gave virtual, unconditional approval of the plans. Instead, Nuckols' review of plaintiff's plans was only a courtesy review to which plaintiff voluntarily submitted. While the UDO strongly recommends such a review, it was not required. Moreover, less than two weeks after the May 2nd meeting, on May 10, 2002, notice was published of the Planning Board meeting and, on May 15, 2002, plaintiff learned of the pending amendment. From those points forward, plaintiff cannot claim that he was not fully informed. Plaintiff could have sought a building permit to vest his rights at any time between May 10-15, 2002 and June 11, 2002. The abortive attempt to submit an

application by one of his representatives on May 22, 2002 shows plaintiff was not ready to submit a permit and that nothing that Nuckols did materially delayed plaintiff in timely obtaining a permit prior to the passage of the ordinance.

In the end, plaintiff simply cannot show that defendants acted improperly by hiding the pending amendment from him, delaying the courtesy review of his plans, lulling him into inaction, or misleading him by giving preliminary approval. Plaintiff has not shown that he ever had a vested property right necessary to maintain a due process claim and has not shown that defendants prevented him from obtaining one. For this reason, his substantive due process claim fails and will be dismissed.

Plaintiff's claim also fails because he has not shown that defendants' actions were so far beyond the bounds of legitimate governmental action that they could not be cured by any process. In fact, the actions taken by defendants in this case were nothing more than those needed to pass run-of-the-mill zoning legislation in the face of landowner opposition. As stated previously, there is no evidence that defendants treated plaintiff any differently than other persons engaging in the voluntary review process and he has not shown that they were obligated to treat him any better by prematurely disclosing contemplated or proposed legislation or suggesting and initialing an expedited permit process. Nothing in this case gives cause to turn an everyday zoning dispute into a federal constitutional violation. For this additional reason, his substantive due process claim fails and will be dismissed.

c. Due Process Claims Under the North Carolina Constitution

Plaintiff's complaint does not specify which provision or provisions of the North Carolina Constitution he is relying on to establish a claim. However, he apparently seeks to allege a due process violation under it. (Complaint at ¶¶ 66, 75) The North Carolina Supreme Court has construed the "law of the land" guarantee under the North Carolina Constitution, Art. I, § 17 to secure a right to due process. G I Surplus Store, Inc. v. Hunter, 257 N.C. 206, 209, 125 S.E.2d 764, 767 (1962). Further, this right to due process is "synonymous with" the right to due process in the United States Constitution. Id. Because plaintiff cannot prevail on his due process claims under the United States Constitution, his claims under the North Carolina Constitution fail as well and will be dismissed.

E. Attorney's Fees

There is one final issue before the Court. In making their motion for summary judgment, defendants have requested that the Court award them costs and reasonable attorney's fees. However, they have briefed neither the standards for such an award nor the reasons why such standards are met in this case. They have also not clarified whether the request covers all claims or only certain ones. The Court assumes that the request for attorney's fees may be directed to plaintiff's federal claims brought under 42 U.S.C. § 1983. If so, such an award will not be made to defendants unless they show that plaintiff's case was frivolous, unreasonable, groundless, or without foundation. Hughes v. Rowe, 449 U.S. 5, 14,

101 S.Ct. 173, 178, 66 L.Ed.2d 163 (1980). This may be hard to do, considering that plaintiff prevailed on state law claims that are not totally unrelated to the federal ones. Nevertheless, if defendants feel that they can satisfy this high standard or are requesting an award as to other claims, they must file a motion and brief within twenty days of the entry of this Order.

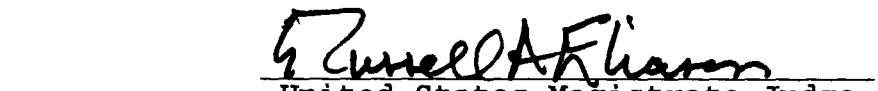
For the reasons set out above,

IT IS THEREFORE ORDERED that plaintiff's motion to amend (docket no. 24) be, and the same hereby is, granted as to the purchase of liability insurance and otherwise denied.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment (docket no. 9) be, and the same hereby is, granted as to his first and second claims for relief and denied as to all other claims.

IT IS FURTHER ORDERED that defendants' motion for summary judgment (docket no. 12) be, and the same hereby is, denied as to plaintiff's first and second claims for relief and granted as to all other claims which are dismissed.

IT IS FURTHER ORDERED that Amendment OA-08-02, which was passed by the Southern Pines Town Council on June 11, 2002 and which bans the building of convenience stores in the Town's Highway Corridor Overlay Districts, is hereby declared null, void, and of no effect.



United States Magistrate Judge

March 3, 2004